

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHWESTERN DIVISION

PAULA F. ADAMS, o/b/o J.A.P.,)	
)	
Plaintiff,)	
)	
v.)	CIVIL ACTION NO. 08-G-0889-NW
)	
MICHAEL J. ASTRUE,)	
Commissioner of Social Security,)	
)	
Defendant.)	

MEMORANDUM OPINION

This cause is before the court upon the motion of the Commissioner to dismiss, or in the alternative, for summary judgment. The court has elected to treat the motion as one for summary judgment, and the motion is now ripe for decision.

The basis for Commissioner's motion is that this action was not timely filed under 42 U.S.C. § 405(g), which provides that a civil action seeking review of a final decision by the Commissioner must be "commenced within sixty days after the mailing to him of notice of such decision...." The Commissioner has interpreted "mailing" as the date of receipt by the individual of the Appeals Council's notice of denial of request for review of the presiding officer's decision. 20 C.F.R. § 422.210(c)(2006). The date of receipt is presumed to be five days after the date of such notice, unless there is a


reasonable showing to the contrary made to the Appeals Council. 20 C.F.R. §§ 404.901, 416.1401, 422.210(c)(2006).

The uncontradicted declaration of Patrick J. Herbst establishes that the Appeals Council denied review of plaintiff's claim on February 28, 2008. The fifth day following the Appeals Council's denial was March 4, 2008, and the Commissioner bases his motion upon that receipt date. Based upon this receipt date, the sixty day statute of limitations for commencing a civil action expired on May 3, 2008. Plaintiff's complaint was filed May 21, 2008.

The plaintiff has filed nothing in opposition to the Commissioner's motion and there appear to be no circumstances in the present case that would justify a tolling of the sixty-day requirement of 42 U.S.C. § 405(g). Accordingly, there exist no genuine issue as to any material fact, and plaintiff's appeal is due to be dismissed with prejudice.

An appropriate order will be entered contemporaneously herewith.

DONE and ORDERED 29 September 2008.


UNITED STATES DISTRICT JUDGE
J. FOY GUIN, JR.